Nos. 86-1953, 86-1954, and 86-1955

In the Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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RENA O. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ARTHUR W. MARBLE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

CALVIN COX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an instruction permitting a court-martial panel to infer that petitioner's use of marijuana was "wrongful" shifted the burden of proof on that element of the offense to petitioner (Nos. 86-1953, 86-1954, and 86-1955).

2. Whether the military's procedure of warrantless, random, compulsory urinalysis inspections violates the Fourth Amendment in the absence of a reasonable suspicion that a servicemember has used narcotics (No. 86-1955).

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OPINIONS BELOW

The orders of the Court of Military Appeals (86-1953 Pet. App. 1a; 86-1954 Pet. App. 1a; 86-1955 Pet. App. 1a) are reported at 24 M.J. 127. The orders of the Air Force Court of Military Review (86-1953 Pet. App. 2a-3a; 86-1954 Pet. App. 2a-3a; 86-1955 Pet. App. 2a) are unreported.

JURISDICTION

The judgments of the Court of Military Appeals (86-1953 Pet. App. 1a; 86-1954 Pet. App. 1a; 86-1955 Pet. App. 1a) were entered on April 8, 1987. The petitions for writs of certiorari were filed on June 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

1. *No. 86-1953.* Following a special court-martial before a military judge at England Air Force Base in Louisiana, petitioner Hill, a member of the United States Air Force, was convicted of the wrongful use of marijuana, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. (Supp. III) 912a. She was sentenced to an $800 forfeiture of pay, a reduction in grade, and a bad conduct discharge. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (86-1953 Pet. App. 2a-3a). The Court of Military Appeals affirmed (*id.* at 1a).

On January 18, 1985, petitioner Hill provided a urine sample at the England Air Force Base hospital as part of a random inspection of members of her unit (Tr. 33). That day, petitioner's sample and others were shipped by registered mail to the Air Force drug detection laboratory at Brooks Air Force Base in Texas (Tr. 74-76; GX 5). Subsequent screening and confirmatory tests at the Brooks laboratory and at CompuChem Labs, a civilian toxicology laboratory, disclosed the presence of tetrahydrocannabinoid (THC) in petitioner Hill's urine (Tr. 181, 191). THC is the major psychoactive metabolite of marijuana; it is unique to marijuana and is found in no other substance (Tr. 165).

The prosecution's case consisted of the urinalysis test results and the testimony of Dr. Naresh C. Jain, an expert in forensic toxicology, who interpreted the test results (Tr. 159-209; GXs 6, 8, 11). Dr. Jain testified that the level of THC in petitioner Hill's urine sample was "absolutely" consistent with petitioner's use of marijuana within the 30 days preceding the date she provided the sample, and that she had most likely used marijuana within the preceding three days (Tr. 192). Dr. Jain categorically rejected any possibility that contamination of the sample or passive inhalation (*i.e.*, the absorption of marijuana by a nonuser who is in an environment in which marijuana is being used by others) could account for the THC level in petitioner's urine (Tr. 169). Dr. Jain further testified that even if urine leaked out of the two samples that had been shipped with petitioner's sample, her sample would have been unaffected. Lastly, Dr. Jain testified that all of the remaining samples in the batch with petitioner's from England Air Force Base tested negative for the presence of THC (Tr. 198-199; GX 5). Petitioner Hill did not present any evidence on her behalf.

2. *No. 86-1954.* Following a general court-martial before a military judge at Barksdale Air Force Base in Louisiana, petitioner Marble, a member of the United States Air Force, was convicted of the wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. (Supp. III) 912a. He was sentenced to five months' confinement, forfeiture of $6,000, and dismissal from the service. The convening authority approved the sentence. The Air Force Court of Military Review affirmed the findings and sentence (86-1954 Pet. App. 2a-3a). The Court of Military Appeals affirmed (*id.* at 1a).

On August 30, 1984, petitioner Marble provided a urine sample at the Barksdale Air Force Base hospital for urinalysis testing as part of a random inspection of members of his unit (Tr. 63, 64). On September 4, 1984,

this sample and others were shipped by registered mail to the Air Force drug detection laboratory at Brooks Air Force Base, Texas (Tr. 91-93). Subsequent screening and confirmatory tests at the Brooks laboratory and at CompuChem Labs disclosed the presence of THC in petitioner Marble's urine (Tr. 256; GX 17, at 4).[1]

The prosecution's case consisted of the urinalysis test results and the testimony of Dr. Michael A. Peat, an expert in forensic toxicology, who interpreted the test results (Tr. 248-277, 311-319; GXs 5, 11-14, 17). Dr. Peat testified that the levels of THC in petitioner Marble's urine sample were "[e]xtremely consistent" with petitioner's use of marijuana within the 30 days preceding the date he provided the sample, and that it was likely that petitioner had used marijuana within the prior two or three days (Tr. 262, 265). Dr. Peat viewed as "improbable" petitioner Marble's not feeling the effects of marijuana use in light of the THC levels found (Tr. 263-264), and he categorically rejected the possibility that "passive inhalation" could account for the THC level in petitioner's urine (Tr. 269-270).

Testifying on his own behalf, petitioner Marble denied ever smoking marijuana or using "any drugs whatsoever" (Tr. 290-291), but he offered no explanation for the positive urinalysis test results (Tr. 291). Petitioner Marble also testified that about five days before giving the sample he attended an off-base party where he consumed some of the food and drinks provided by the host, but he did not contend that the food or drinks were adulterated with marijuana or another drug (Tr. 289-290, 297-298, 303). Nevertheless, to rebut any implication of innocent ingestion, the prosecution recalled Dr. Peat in rebuttal, and he

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[1] Petitioner does not contest the validity of the chain of custody or the testing procedures used with respect to his urine sample, nor does he contest the accuracy or reliability of the scientific principles involved in the tests employed (radioammunoassay and gas chromatography/mass spectrometry) (see Pet. 3 n.1).

testified that it was "extremely unlikely" that consumption of adulterated food or drink four or five days before the urine sample was taken could account for the THC levels found in petitioner Marble's urine sample (Tr. 313). Dr. Peat did acknowledge that ingestion of hashish or hashish oil—both rarer forms of marijuana—within a shorter period of time prior to giving the sample could possibly result in THC levels similar to those found in petitioner Marble's urine (Tr. 315-316). Dr. Peat also testified that marijuana used "cold" in foods such as salads is much less effective in releasing THC within the body than marijuana which is baked or cooked, and that marijuana found in cold foods would have to be ingested in much greater amounts or in a much shorter period of time to account for the concentration of THC involved in this case (Tr. 318-319).

3. *No. 86-1955.* Following a special court-martial at Homestead Air Force Base in Florida, petitioner Cox, a member of the United States Air Force, was convicted of the wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. (Supp. III) 912a. He was sentenced to two months' imprisonment, a reduction in rank to airman basic, and a bad conduct discharge. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (86-1955 Pet. App. 2a). The Court of Military Appeals affirmed (*id.* at 1a).

On October 22, 1985, petitioner Cox provided a urine sample at the Homestead Air Force Base Hospital for urinalysis testing as part of a random inspection of active duty members assigned to the base (Tr. 32). On that day, that sample and others were shipped by registered mail to the Air Force drug detection laboratory at Brooks Air Force Base, Texas (Tr. 34-35). Subsequent screening and confirmatory tests at the Brooks laboratory and at CompuChem Laboratory disclosed the presence of ben-

zoylecgonine (BE) in petitioner Cox's urine (Tr. 78, 82; GX 7, at 1; GX 8, at 1). BE is the major psychoactive component of cocaine that is commonly detected. Its presence in the urine conclusively establishes the use of cocaine (Tr. 76, 83-85).[2]

The prosecution's case consisted of the urinalysis test results and the testimony of Dr. Michael A. Peat, an expert in forensic toxicology, who interpreted the results (Tr. 72-89; GXs 6-8). Dr. Peat testified that the levels of BE metabolite in petitioner Cox's urine samples were consistent with petitioner's use of cocaine within the 30 days preceding the date he provided the sample (Tr. 83-84).

Testifying on his own behalf, petitioner Cox denied ever using cocaine (Tr. 90-91, 93), but he offered no explanation for the positive urinalysis results (Tr. 90-96). Petitioner Cox also testified that the day before giving the sample he had watched TV and drunk a couple of beers with a friend, and that he had gone that night to a club where he had a few drinks. Petitioner Cox did not expressly contend that the beers or drinks were adulterated with cocaine or any other drug, nor did he say he felt the effects of cocaine after drinking that day (Tr. 92-93).

The trial judge instructed the court-martial panel as follows on the elements of the offense (Tr. 124-125):

> To be punishable under Article 112a of the Uniform Code of Military Justice, use of a controlled substance must be wrongful. Use of a controlled substance is wrongful if it is without legal justification or authorization. Use of a controlled substance is not wrongful if, one, done pursuant to legitimate law enforcement activities, for example an informant who

[2] Petitioner does not contest the validity of the chain of custody or the testing procedures used with respect to his urine sample, nor does he contest the accuracy or reliability of the scientific principles involved in the tests employed (Tr. 11-12; GX 1).

> is forced to use drugs as a part of an undercover operation in order not to be discovered; or, two, if done by authorized personnel in the performance of medical duties or experiments; or, three, without knowledge of the contraband nature of the substance. Use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.

Petitioner Cox did not object to this instruction, nor did he request any additional instruction (Tr. 108, 110, 129).

ARGUMENT

1. Petitioners Hill, Marble, and Cox contend (86-1953 Pet. 4-8; 86-1954 Pet. 7-25; 86-1955 Pet. 22-24) that the inference of wrongful use of marijuana authorized by *Manual for Courts-Martial, United States—1984*, Pt. IV, para. 37c(5) (*Manual*) is unconstitutional because it is irrational and because it shifts to the defendant the burden of proof on an essential element of the offense of the wrongful use of marijuana.[3] That claim is not materially different from the question presented in *Douglas* v. *United States*, No. 86-1893. For the reasons given in our brief in opposition in that case,[4] review by this Court of petitioners' contention is unwarranted.[5]

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[3] Petitioners Hill and Marble were convicted in a bench trial, so no instructions were involved.

[4] We have provided counsel for each petitioner with a copy of our brief in *Douglas*.

[5] Petitioners' reliance on *State* v. *Flinchpaugh*, 232 Kan. 831, 659 P.2d 208 (1983), is misplaced. That case did not arise in the unique context of the military system, which, for several reasons, reduces the likelihood that any particular use of contraband is innocent. See *United States* v. *Ford*, 23 M.J. 331, 336-337 (C.M.A. 1987).

2. Petitioner Marble also contends (86-1954 Pet. 25-29) that Part IV, para. 37c(5) of the *Manual* is unconstitutional because it requires the defendant to bear the burden of production on the wrongfulness element of the offense. That claim is insubstantial. As the Court of Military Appeals explained in *United States* v. *Harper*, 22 M.J. 157, 162 (C.M.A. 1986), the permissive inference authorized by the *Manual* only requires a defendant to come forward with some evidence that his use of marijuana was innocent. Shifting the burden of going forward to the defendant is not unconstitutional. *E.g.*, *Simopoulos* v. *Virginia*, 462 U.S. 506, 510 (1983); *Engle* v. *Isaac*, 456 U.S. 107, 120-121 & n.20 (1982); *Mullaney* v. *Wilbur*, 421 U.S. 684, 701-703 nn. 28, 30-31 (1975); *Barnes* v. *United States*, 412 U.S. 837, 846 n.11 (1973); *United States* v. *Harper*, 22 M.J. at 162.[6] Petitioner Marble's claim therefore lacks merit.

3. Finally, petitioner Cox contends (86-1955 Pet. 12-22) that random, compulsory urinalysis inspections are an unlawful search or seizure forbidden by the Fourth Amendment. Petitioner has waived that claim, however. The rules of procedure governing courts-martial require a defendant to raise a claim such as this one by filing a motion to suppress before entering a plea. The failure to do so amounts to a waiver of the claim absent "good cause" for the default. Rule for Court-Martial 905(b)(3) and 905(e), *Manual for Courts-Martial, United States—1984*; Mil. R. Evid. 311(a)(1) and 311(d)(2)(A); cf. Fed. R. Crim. P. 12(b)(3) and 12(f); *Davis* v. *United States*, 411 U.S. 233 (1973). Petitioner did not raise this claim at trial, and he has offered no excuse, much less good cause, for his failure to do so. Moreover, petitioner did not raise the claim before the Air Force Court of Military Review or

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[6] Petitioner Cox's reliance on *Mullaney* v. *Wilbur*, *supra*, is misplaced. *Mullaney* held invalid a state rule shifting the burden of proof to the accused, not simply the burden of going forward.

before the Court of Military Appeals. Petitioner's claim has made its debut in this Court, and this Court should therefore decline to consider it. See, *e.g.*, *Solorio* v. *United States*, No. 85-1581 (June 25, 1987), slip op. 15 n.18.[7]

[7] Petitioner's claim would not warrant review by this Court in any event. The military courts have ruled that warrantless, random, compulsory urinalysis inspections do not violate the Fourth Amendment even when conducted in the absence of a reasonable suspicion that a servicemember has used contraband, *Murray* v. *Haldeman*, 16 M.J. 74, 81 (C.M.A. 1983); *United States* v. *Wade*, 15 M.J. 993, 1003-1004 (N.M.C.M.R. 1983), and the only civilian court to consider the issue has agreed with the military courts, *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 474-477 (D.C. Cir. 1975). These courts have upheld random urinalysis inspections on the grounds that (1) drug use in the armed forces poses a substantial threat to military readiness and efficiency; (2) servicemembers have a lower expectation of privacy than civilians; (3) the primary purpose of such inspections is to protect the health of the servicemembers and the ability of a unit to carry out its mission, rather than to discover evidence for a criminal prosecution; (4) unannounced drug inspections are the most effective means of identifying drug users; and (5) the military has attempted to guard the dignity and privacy of soldiers insofar as practicable. *Murray*, 16 M.J. at 81; *Callaway*, 518 F.2d at 476-477; Mil. R. Evid. 313(b). None of the cases cited by petitioner involve the unique environment of the military. They are therefore not persuasive precedents with respect to the issue of compulsory drug-testing in the armed services.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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